No. 21719, 21719A, 21719B, 21719C, 21719D

In the

United States Court of Appeals

For the Ninth Circuit

JOHN A. CROSS, et al., *Appellants*, vs. S.S. KAIMANA, her engines, etc., et al., *Appellees.*	No. 21719
JOHN A. CROSS, et al., *Appellants*, vs. S.S. LANAKILA, her engines, etc., et al., *Appellees.*	No. 21719A
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JOHN A. CROSS, et al., *Appellants*, vs. S.S. COAST PROGRESS, her engines, etc., et al., *Appellees.*	No. 21719D

Reply Brief of Appellants

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Reply Brief of Appellants

Appellants assert that the sums they seek to collect are sums advanced as elements of the agreed compensation for maritime services rendered by crew members of the libeled vessels and so are

enforceable against these vessels through the maritime lien for seamen's wages. As we pointed out in our opening brief (Op. Br. 34-43), the court below accepted our basic arguments as to the admiralty law and then erroneously distinguished them. We shall now briefly restate our arguments and summarize the response of respondents before taking up this response in detail.

Appellants rely on the seamen's contracts. Appellants' claims are based upon the non-performance of wage obligations in the employment contract between the operators of the libeled vessels and the crew members who performed maritime services aboard them. By each such contract, the libeled vessel's operator agreed to provide each crew member with fractional rights to vacation, fractional rights to pensions, and fractional rights to welfare coverage for each day of maritime services. To provide the seamen these fractional rights, the vessel operator agreed to pay their value to the trusts. The individual contracts further provided that these rights can be accumulated so that each seaman can actually collect the three types of deferred compensation in accordance with the plans that have been agreed upon through collective bargaining and incorporated into the seamen's individual employment contracts.

The claims of appellants are based upon the existence of these contracts of employment between each crew member and the vessel operator, the performance of maritime services under these contracts, the failure of the vessel or the vessel operator to pay these agreed wages by providing these fractional rights, and the provision of these rights by the trusts, which were set up by the seamen as conduits for collecting on these rights. These rights were provided by the trusts by their advancing credit to the vessel in reliance on the lien for wages, by accepting as valid and enforceable the fractional rights earned by the men for their work on the libeled vessels. Each trust now sues to recover the moneys advanced to the crew members for this portion of the wages of each for maritime services on the libeled vessels.

In reply respondents make two principal contentions as well as several subsidiary claims. First, respondents contend that the

trusts cannot sue in admiralty and there is no maritime lien for wages because each suit seeks to collect "Employer Contributions" due under a collective bargaining contract obligation of the vessel operator to the trust. Second, respondents contend that the performance of maritime services creates no lien securing the payment of these "Employer Contributions" because the deferred compensation, which was agreed to be paid for the maritime services, is not paid in cash immediately after the services are performed. They add that there are actuarial considerations and contract conditions that affect the exact amount of the deferred cash collected later on through the multi-employer—multi-seamen trusts established to channel their compensation to the seamen.

REPLY ARGUMENT

1. Admiralty jurisdiction embraces the claim presented by appellants.

Respondents' attack on admiralty jurisdiction, like other arguments they make, depends upon their establishing that each of appellants' claims is no more than a demand for "Employer Contributions" that a collective bargaining agreement obligates the vessel operator to pay to the trust. However, in the seventy five claims here each trust relies on obligations from the vessel's operator to the several seamen under each one's own contract of employment. (See 4-5, infra). The seaman worked under it on the vessel. Its operator, as a result, incurred an obligation to the seaman. This maritime obligation has not been met.

A seaman can collect his cash wages in admiralty. He is entitled to collect in admiralty although his claim refers to the collective bargaining agreement to provide the measure of his compensation in his individual contract for the performance of maritime services. *Lakos v. Saliaris, The Leonidas,* 116 F.2d 440 (4 Cir. 1940); *Glandzis v. Callinicos,* 140 F.2d 111 (2 Cir. 1944). He can proceed *in rem* for these wages.

The trusts proceed on the same basis. Appellants have shown that maritime services were performed, that there was an agreed

consideration for these services in a maritime contract, that a portion of the consideration was not paid by the vessel operator, and that the trusts provided these portions of the agreed wages. These facts establish that the trusts are entitled to enforce the maritime lien that is security for these wages. Such a claim is within admiralty jurisdiction.

2. Respondents' arguments do not relate to the admiralty obligations, the maritime facts, and the admiralty remedies relied upon by appellants.

The irrelevance of respondents' arguments is disclosed by consideration of these arguments in relation to the facts, their legal consequences and the arguments of appellants.

(a) Respondents ignore the individual contracts.

Respondents' fundamental mistake of admiralty and labor law is stated in the brief of the United States (p. 14):

> "The actual contract is between the man and the master of the ship, i.e., the shipping articles. The agreements between PMA and the Unions are preliminary to the actual agreement made by the seaman himself to work aboard a particular vessel and not a part of it."

This is not correct.

When a seaman joins a vessel to go to sea, he makes an individual contract that includes the terms in the articles, *if there are any*. (See Op. Br. 7-9). In addition it includes, as well as the terms implied from statutes, the full "wage package" provisions of the collective bargaining agreement. (The terseness of the articles is discussed at 15, infra.)

The collective bargaining agreement terms become part of the contract between the seaman and the vessel operator. That agreement sets forth the "wage package" terms under which seamen offer to go to sea; it also sets forth the "wage package" terms under which vessels offer employment aboard ship. Hence, when the seaman accepts the offer of the employer or the employer accepts the offer of the seaman, an individual employment contract is consummated that includes a promise to perform maritime serv-

ices and a reciprocal promise to pay the compensation specified in the collective bargaining agreement.

Respondents seem to urge that no lien applies to the wage payments that the operators of the libeled vessels failed to pay on the theory the seaman cannot sue for these sums. But he has rights on which he can sue. The seaman would not have worked unless his employer promised him valid, enforceable, indefeasible rights to deferred compensation. The employer made this promise to the seaman. When services were performed under the contract, the consideration specified in the collective bargaining agreement was payable for them. Hence there is a contractual obligation to the seaman that the specified moneys be paid into the plan and that he have fractional rights on which he can rely when he seeks to collect from the plans, without having to hope that the trusts will give credit on the strength of the lien for wages. The seaman can sue to enforce this obligation.[1]

(b) On the credit of the vessel, the trusts advanced wages for the vessel operator to meet the rights of its seamen.

Coastwise Line and Dorama were each liable to pay to the trusts the value of the fractional rights its seamen earned. Although these debts were not paid, the trusts advanced wages to the seamen of their vessels by giving them full credit for the fractional rights they earned. The seamen thus got exactly what they were promised by the vessel operator.[2] But the debts of Coastwise and Dorama have not been discharged.

The credits were advanced in reliance on the lien. There was no basis to expect that other employers would pay the

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1. In addition, he holds rights to collect the sums due under the plans. These also can be enforced by litigation, subject of course to the usual requirement in a collective bargaining agreement, of exhausting the contractual administrative remedies. *Vaca v. Sipes,* 386 U.S. 171 (1967); *Humphrey v. Moore,* 375 U.S. 335, reh. den. 376 U.S. 935 (1964); *General Drivers v. Riss and Company, Inc.,* 372 U.S. 517 (1963); *Elgin, Joliet & Eastern R. Co. v. Burley,* 325 U.S. 711 (1945).

2. The fractional right is equal, in money value, to the amount of the employer contribution that was to have been paid (see Op. Br. 14-15, 33-34). Hence the trusts advanced value equal to the contributions due.

contributions of Dorama and Coastwise, for the plan documents state:

> "Neither the Association nor any Contributing Employer shall be liable . . . for contributions due from any other Contributing Employer. . . ." (see Op. Br. App. 11-22).

The basis for the action of the trustees in advancing the paid-up value of these rights is set forth in the 1958 language of one of the deferred compensation contracts, reading:

> "If a Contributing Employer is delinquent or default in payment of contributions, *the lien against the ship for seamen's wages shall be available* to the Trustee and if suit is brought to recover such contributions, interest thereon shall be payable at the rate of 7%, and all costs of collecting such delinquent or defaulted contributions, including a reasonable attorney's fee, shall be paid by the Contributing Employer".[3] (Emphasis added). (See Reply Br. App. ¶¶ 38, 49).

(c) The cases relied upon by the respondents emphasize their failure to meet the admiralty law principles relied upon by appellants.

Respondents cite many opinions not involving maritime services or individual employment contracts for such services. *Goumas v. Karras & Son,* 51 F. Supp. 145 (S.D.N.Y. 1943), aff'd. 140 F.2d 157 (2 Cir. 1944), involved a contract to provide seamen. The seamen provided to the ship refused to work on it because is was uninhabitable. No maritime services were performed. No individual contract was made for performing such services. *Marchessini & Co. v. Pacific Marine Corporation,* 227 F.Supp. 17, 1964 A.M.C. 1538 (S.D.N.Y. 1964), holds that an agreement to husband vessels, to solicit cargo and to collect freight is a non-maritime contract because it does not cover the navigation and management of any vessel. This case does not apply here because the services

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3. This language was adopted in 1958 at the time the agreements were changed to require the employers to pay the contributions necessary to support the agreed level of benefits. (*cf.* Vessels' Exhibit G, para. 16, 19 and 21).

performed here are analogous to the navigation of the vessel, the missing element there. *The Josephine & Mary,* 120 F.2d 459 (1 Cir. 1941), involved a suit by a seaman to enforce a personal injury settlement agreement. This was not a contract calling for maritime services. None were performed under the settlement agreement. It was a non-maritime contract setting forth a new obligation of the vessel operator in lieu of one that had previously accrued.

One key to the differences between the cases relied upon by respondents and the situation presented by appellants is indicated by the language in the brief of the United States (pp. 13-14) stating that the senior maritime liens, under 46 U.S.C. § 953, cover only "debts for necessaries created on the security of the ship to allow her to continue her voyage".[4] The three cases discussed immediately above do not involve "debts for necessaries . . . to allow [the ship] to continue her voyage". The same is true of the other cases relied on by respondents, including *Ward v. Thompson,* 22 How. (63 U.S.) 330 (1859). It holds that a partnership agreement among partners operating a vessel is not within the admiralty jurisdiction, although a charter party for the hiring of a ship for a given voyage is clearly within such jurisdiction. While such cases involving contracts having "a remote reference to navigation and commerce" are outside of the admiralty jurisdiction (compare U. S. brief, 12-16; PFEL brief, 14-16), they have no relevance to the present issues involving obligations for maritime services under seamen's employment contracts.

Respondents also rely on a line of cases dealing with obligations in collective bargaining agreements to pay "Employer Contributions" into deferred compensation plans. These opinions specifically state they were not based on the individual contracts. Thus *The Golden Sail,* 197 F.Supp. 777 (D. C. Ore. 1961), states at 779 that the action there was a "claim under the union bargaining agreement". The lower court opinion in *The Denton,* 1960 A.M.C. 2264 (D.C.S.D. Texas, 1960), states that the proceeding was to enforce the collective bargaining agreement. The same is

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4. One reason why ship mortgage liens are junior to these other liens is that they are not so limited in scope.

said in *The Kingston,* 1961 A.M.C. 1321 (D.C.S.D. Texas, 1961), and in the Fifth Circuit opinions in *Brandon v. The Denton,* 302 F.2d 404 (5 Cir. 1962), and in *The Ozark* (by citation), 304 F.2d 717, 720 (5 Cir. 1962).[5]

(d) Respondents' proposed new rule, to limit the lien to wages similar to those stated in the articles, should not be adopted.

The Fifth Circuit's opinion in *Brandon v. The Denton,* 302 F.2d 404 (5 Cir. 1962) states that the maritime lien for wages is limited to the wages specified in the shipping articles. This is also stated in the opinion in *The Golden Sail,* 197 F.Supp. 777 (D. C. Oregon, 1961).[6] Respondents, however, recognize that this contravenes admiralty law and so offer a new proposition. They propose that the lien shall apply only to "the *kind* of payments dealt with in shipping articles, viz., payments which the workers receive directly to use as they wish and are entitled to sue for if necessary" (PFEL brief, p. 17).

None of the opinions constituting the "numerical weight" relied on by respondents (see PFEL brief, pp 12-16) is based upon this legal reasoning. All are based upon other legal theories, every one of which our briefs show to be without validity (Op. Br. 19-41; supra 7-8). Accordingly, when respondents urge that these decisions should be followed because of a reason not set forth in the opinions, they admit there is no admiralty precedent supporting their position. The Court, we submit, should follow the logic and thrust of the admiralty law appellants have presented (Op. Br. 17-28) and reject respondents' suggestion that it adopt a novel principle derived from cases wrongly decided on inapplicable or erroneous admiralty theories.

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5. The two Texas district court commissioner opinions also indicate that these agreements were held to include a specific negation of admiralty jurisdiction (1960 A.M.C. 2279; 1961 A.M.C. 1345).

6. The district court added, 197 F.Supp. at 779, that there is an "essential difference between union bargaining agreements of workers ashore and the signing of ship's articles between the seamen and the master of the vessel for the voyage, which is governed by 'shipment of the crew' ", referring to c. 18 of 46 U.S.C., §§ 561-591.

(e) The bankruptcy precedents are not applicable.

Our opening brief disposes of the arguments that bankruptcy law precedents, involving a policy unique to the bankruptcy laws, are governing in admiralty. (Op. Br. 41-43).

Nothing is added by *Joint Industry Board of the Electrical Industry v. United States,* ..... U.S. ....., 20 L. ed. 2d 546 (May 20, 1968). The 1968 opinion calls attention to the unusual character of the bankruptcy policy involved, and so confirms its inapplicability in admiralty. Thus the Court's majority opinion repeats that the bankruptcy law gives a certain priority to some of the "**wages . . . due to workmen**" in order to give the workmen temporary relief from the unemployment expected to arise as a result of the bankruptcy of their employer. In contrast, the admiralty policy is that each seaman shall be paid *every portion of his wages* due for his performance of maritime services before any other person can collect against the security that the vessel provides for payment of these wages and certain other debts (see Op. Br. 41-43).[7] The admiralty liens have developed as a means of assuring that vessels proceeding all over the world can be held liable anywhere for the debts necessary to permit the vessel to continue on its voyage. The lien for wages means that the seaman does not have to seek the employer, to find him wherever he may be throughout the world, in order to get any of his wages. The lien is to see to it that every seaman gets all of the wages that are "justly due" to him because they are called for under his contract of employment. It is for this reason that appellants properly rely upon *United States v. Carter,* 353 U. S. 210 (1957).

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7. We also point out that the bankruptcy statute and precedents cited relate to the distribution of those assets of a bankrupt that do not secure specific debts; in contrast the admiralty issue has to do with defining the debts secured by a specific asset of an owner who may be entirely solvent.

In addition to these differences in policy, there is a significant difference in language. There is no logical basis for saying that the bankruptcy phrase quoted, used in defining a preference, means the same as the word "wages" when used without the restricting language in the phrase, particularly where the word is used descriptively only to provide a reference to one of the maritime liens (Also compare 14-16, infra.).

(f) The existence of other non-admiralty obligations and other non-admiralty remedies is of no significance.

There are several obligations calling for payment of the amount here claimed. We have outlined the obligation calling for payment to each trust of the value of the wages advanced by the trust. There is another maritime contract obligation - in the individual employment contracts appellants rely upon - running to the individual seaman and requiring payment of "Employer Contributions". Further, the employer has an obligation under the collective bargaining agreement, when services are performed, to pay the "Employer Contributions" and the other elements of the seamen's wages. Finally, the vessel operator may also be under an obligation in a contract among all of the employers under which each agrees with the other employers that it will pay the contributions into each plan in order to make it effective.

The value of the wages (fractional rights) advanced by the trusts equals these contributions (see Op. Br. 14, 33-34, 37-38). Hence, the payment to the trusts of the amount here claimed will satisfy and extinguish all these obligations. However, the trusts are free to choose to proceed on those enforceable *in rem* in admiralty.

Respondents' *in rem* rights are not destroyed because there are *in personam* remedies to collect the amounts here sought. The same *in personam* remedies lie to collect in a non-admiralty court, or in admiralty, the amount of other items of wages of the seaman should he prefer to proceed in a state court or in the federal court without libeling the vessel. So too, there is ordinarily an *in personam* right to proceed on the underlying note to collect in a non-admiralty court the amount of a debt secured by a ship's mortgage.[8] The availability of these remedies to enforce these other obligations in no way precludes use of the *in rem* proceeding in admiralty to enforce the maritime lien securing the admiralty obligation. The availability of the comparable *in personam*

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8. The mortgage documents specifically so provide (C.T. 8-N, § 1(2); Reply Br. App. ¶ 14).

remedies in no way defeats, or reduces in scope or significance, the obligation, the lien or the remedy relied on by the trusts.[9]

Similarly, it is not important that there is security in addition to the lien. By getting other employers to agree to keep full the pots out of which the benefits are paid,[10] the unions have been able to negotiate a second type of security to assure crew members that they can translate their fractional rights into "take-home" vacation pay, pensions and welfare. The availability of other security does not defeat this lien. See, e. g. *Brock v. S.S. Southhampton,* 231 F.Supp, 280 (D. Ore. 1964).

In *The Southhampton,* the Israel bank entered into an agreement with the unions representing the seamen and the vessel's owner under which the bank agreed to provide money to meet the wages due to members of the crew of the Southhampton and the bank received guarantees of reimbursement from the owner, plus certain other security. It did so in the form of a letter of credit. Drawings were made against the letter of credit, the proceeds being used to pay wages due to the seamen of the Southhampton. The bank thereafter libeled the Southhampton for the amounts advanced. It collected on the ground that it had advanced the wages in reliance on the credit of the vessel, as well as on the credit of the owner and on the other security provided to protect the bank. The court stated, 231 F. Supp. 282:

> "Under the maritime theory of advancement, one who pays the claim of the maritime lienor is entitled to the rights previously acquired by the lienor. * * *
>
> "[The bank] issued its letter of credit, not to the owner, but to an agent of the crew, to assure payment of crews' wages and other compensation as these obligations arose. In fact, the letter of credit was drawn on, and wages and compensation paid, only after they were earned. Israel claims only the amounts paid to crew members of the SS Southhampton."

Here each of the appellant trusts had an agreement with the union representing the seamen and with the operator of each of the libeled vessels (the plan documents and the Dorama non-member participating agreement) under which the trusts agreed

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9. Compare *Smith v. Evening News Association,* 371 U.S. 195 (1962).

10. At this time these was also agreement that the lien for wages secured the payment of the money due into the trusts. See n. 3, supra.

to accept and recognize the fractional rights - so that the crew members of the vessel would receive, and could collect on, the consideration due to them for their performance of maritime services on the vessel - and the trusts received guarantees of payment of contributions from the ship operator and had other security in the lien for wages. The employer failed to make the payments necessary to satisfy its fractional rights obligation to the crew members earned as part of the compensation for their work on the vessels. The trusts nevertheless gave validated fractional rights, relying like the bank on the security of the vessel. As they advanced the agreed wages and seek their value, the trusts should collect *in rem* in admiralty.

3. The characteristics of deferred compensation do not extinguish the lien for wages or preclude its existence or enforcement.

Respondents urge that the lien for wages is not enforceable because the deferred compensation is received in some form other than immediate cash payments to be used as the seaman wishes at the end of the voyage. The seamen chose to take some of their total compensation for services, i.e. the "wage package",[11] in vacation pay, pensions and welfare coverage. The cost to the vessel operator would have been the same, however, had the seamen chose to allocate their "wage package" differently. The decision to collect some of their compensation in these deferred forms is socially sound, is encouraged by the tax laws, and is part of the realities of today's labor relations ashore and afloat (See Reply Br. App. ¶¶ 17-24; 62; Vessels' Exhibit D).

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11. The United States (p. 28) asserts that the term "wage package" is the invention of appellants for the purpose of this litigation. It is used by the Supreme Court in *United States v. Embassy Restaurant,* 359 U.S. 29 at 33 (1959). See also Reply Br. App. ¶ 24.

(a) Respondents' technical objections to enforcing the lien are groundless because the trusts advanced to the seamen the exact wages they earned.

Respondents' arguments with respect to advances, assignments and subrogation (see PFEL brief 17-21; U.S. brief 11-12) are without merit because (See 4-5, supra) the trusts provided the seamen with the precise wages they earned. It is unimportant that the crew member can proceed legally only to collect the products of his accumulation of fractional rights. It is not important that the money paid in by the individual operator is in direct proportion to the work done by the individual crew member, while the benefits received at later dates are not in this direct proportion (PFEL brief, 8, 17; U.S. brief 22) or that the contributions measured by the seaman's employment on a vessel are not kept in a separate account for his exclusive use (PFEL brief 18; U.S. brief 22) or that they are not available to the seaman in place of his fractional rights (PFEL brief 7, 17; U.S. brief 7). The foregoing, necessary or common to multi-employer—multi-employe plans, are not important because the contract provided that the deferred compensation part, of the agreed consideration for the maritime work on the vessel, was to be the fractional rights to collect benefits in this way.

Similarly, it is unimportant that the contributions go into a general fund while the fractional rights are credited to the seaman. Although the dollars paid in lost their identity in the fund, the credits were clearly earmarked for each man when they were accepted by the appropriate trust. This action gave the seaman what he had coming as to his "specific, identifiable, then due wage claims" against the vessel and its operators.

(b) The lien is not to be denied because the seamen on the libeled vessels collected their benefits.

Respondents base much of their argument on the asserted facts that the seamen here were entitled to collect the agreed-upon fruits of their fractional rights even though the vessel operator failed to pay their value into the trusts. The scope of the lien for wages cannot be based on such facts. Trusts cannot, as a practical matter, advance vacation pay, pensions and welfare coverage unless they can rely on the security of the lien for wages.[12]

The seamen will lose if the trusts cannot enforce the lien; any lack of funds in a plan leads eventually to less benefits to some seamen at some time. What is more, the fractional rights for Dorama employment were defeasible when earned. The contract clauses so state.[13] In the absence of the contributions equal to their value, they became indefeasible only when the benefits based on them were collected or they were otherwise "accepted" finally by the trusts. To give full protection to the seaman, the lien for his wages must be enforced here.

(c) The enforcement of the maritime lien as security available to the trusts does not involve any violation of 46 U.S.C. § 599(g).

Respondents' reliance on 46 U.S.C., c. 18, § 599(g) is misplaced. Their major premise is that the word "wages" has the same meaning in c. 18 as in 46 U.S.C., c. 25, § 953(a). This is a false premise. The word "wages" does not have a uniform meaning.[14]

Chapter 18 of 46 U.S.C., which includes § 599, sets forth a variety of provisions relating to the employment and pay of seamen. Among these provisions is 46 U.S.C. § 564, which requires

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12. The lien attaches when the work is done; it is extinguished only when the money due is paid by the vessels' representative. The existence of additional security does not prevent attachment of the lien. Payment by one advancing money on the credit of the vessel does not extinguish the lien (Op. Br. 26-28).

13. Reply Br. App. ¶¶ 33, 34, 35, 40, 41, 47, 50.

14. This is not only because c. 18 uses the word to define the scope of its substantive provisions while it is used in c. 25 merely descriptively to refer to the body of judge-made admiralty law as to the lien securing the payment of all of the seamen's compensation. The more significant reasoning is set out in the body immediately below.

that "the amount of wages which each seaman is to receive" shall be contained in the shipping articles. This provision is satisfied by setting forth only the *base wages* that each seaman is to receive. These are the only wages contained in the shipping articles in the record.[14a] This is the uniform practice although base wages are by no means the total compensation now received by seamen. Section 564 has never been construed to require that the articles contain the amounts of wages paid as overtime pay, penalty pay, penalty cargo bonuses, nonwatchstanding allowances, war bonuses, attack bonuses, maintenance and cure, repatriation, unearned wages, etc. Nevertheless, all these multitudinous facets of seamen's wages are protected by the lien for wages of the crew of the vessel (Op. Br. 19-22). In short, the term "wages" in 46 U.S.C., c. 18, § 564, does not encompass all of the "wages" that are protected by the traditional lien for wages of the members of the crew. No more does the term "wages" as used in § 599 of the same chapter.

The error of respondents is further shown by the fact that the word "wages" has a variety of meanings in different legal contexts. For example, the Internal Revenue Code has elaborate, lengthy definitions of the word "wages", adopted at different times, 26 U.S.C. §§ 3121(a) and 3404(a), etc.[15]

The legislative history of sub-section (g) of § 599 confirms that payment of the contribution is lawful. Congress, in enacting sub-section (g), accepted the testimony that deferred compensation plans could certainly be lawfully financed by any deduction from the wages of seamen, with the possible exception of deductions taken from tax-paid wages of nonmembers of the participating union.[16] This testimony cites provisions in the Labor Management

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14a. These articles (Vessel Exhibit 2-A) were duly witnessed by the deputy shipping commissioner of the Coast Guard, the agency that is required by 46 U.S.C. § 565 to witness the execution of all shipping articles.

15. The trust documents state that the contributions are not "wages" for tax purposes. Respondents are in error in giving greater significance to these clauses. Their true meaning is shown by the paragraphs quoted in Reply Br. App. ¶¶ 30, 31, 36, 39, 44; etc.

16. The legislative history set forth in Vessel's Exhibit C-2 is summarized, with excerpts and explanations, in Reply Br. App. ¶¶ 55-61.

Relations Act, 29 U.S.C. §§ 141-187. In short, the validity of these deductions under the labor relations legislation is controlling.[17] There is no merit in respondent's assertion that collection of the sums claimed by the trusts is illegal under 46 U.S.C. § 599(g) if they are seamen's "wages" secured by the maritime lien.

4. The ranking and scope of the lien created by the Ship Mortgage Act of 1920 is not invaded by giving the superior lien for wages of members of the crew of the vessel its full scope to provide security for all elements of the compensation of members of the crew.

A full answer to any claim that the Ship Mortgage Act of 1920 would be contravened by sustaining the position of appellants is that the law was enacted without the least effect, or purpose, of minimizing or restricting the scope of the lien for wages of the crew of the vessel. The ship mortgage was not given a preference over some types of seamen's compensation. Congress did not intend, or act, to narrow the lien for wages of crew members. By 1920 the history of the lien for wages had established that it applied to newly developed forms of wages, and without regard to what was stated in shipping articles. (Op. Br. 19-25) The creation of a new maritime lien, junior to that for wages, cannot of itself restrict the senior lien; the Congressional failure to express any limit on the senior lien shows that it retains its historic character.

To give the full effect of this lien for wages is not to extend one of the "secret" maritime liens by contruction, analogy, or inference (as implied at page 10 of PFEL's brief). Respondents cite no case to indicate that the quoted principle has ever been used to exclude any part of the seaman's compensation from the security of the lien for wages. We are confident there is no acceptable authority to this effect.

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17. See Reply Br. App. ¶¶ 17-24; 55-61.

Furthermore, and in any event, the union members all gave their consents to all the deductions by their union's written execution of the agreement requiring the deductions. The only possible question is with respect to the unheard-of seaman who is not bound by his union's action (see Reply Br. App. ¶ 61). The possible technical problem as to his deductions from his taxable wages was the subject of (g).

One relying on a ship mortgage is in a situation much different from that of one relying upon a mortgage on shoreside real estate or on chattels. The ship mortgagee does not have the first lien. As the United States states (brief at 32):

> " 'Wages of the crew' are entitled to a priority because they must be paid to keep the ship in operation and, for that reason, benefit even the mortgagee."

Of the same character are the other preferred admiralty liens, which may attach anywhere in the world, as security for longshore wages, for tort damages for injuries to individuals or to other vessels or to maritime installations, for repairs, for general average, for salvage.

To protect the mortgage lien against these senior liens, the mortgagee must use safeguards and police the mortgagor. Sellers of ships, lenders and insurers of ship mortgages - such as PFEL and the United States - have the legal and economic power to police their loans and security. They normally take detailed steps to make this policing easy and effective. The mortgage papers in the present record show detailed safeguards and precise policing tools. These are gathered in the Reply Br. App., ¶¶ 1-16. Their failure to protect their security does not permit them to shift their loss at the expense of the senior lien.[18]

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18. To the extent that the specific facts as to "secret" action are material, they support appellants. The language quoted above (at 6), specifically recognizing the availability of the wage lien to secure delinquent contributions, was in an agreement executed on October 1, 1958, shortly before the delinquencies here at issue started to develop. It was signed individually by PFEL by its agent for this purpose, T. E. Cuffe, who also was a trustee. He also signed the documents of a number of the plans, see Reply Br. App. ¶¶ 43, 45, 46, 52, 54. 1958 documents recognizing the availability of the lien, with signatures of T. E. Cuffe for PFEL are printed in the Reply Br. App. ¶¶ 38-42; 49-51. Furthermore, PFEL was the California agent of Coastwise Line (C.T. 27:22-27). The United States also had knowledge of the financial condition of the vessel operators. Late in 1959 (C.T. 825:17-18; 832:22-833:2), and again late in 1960 (C.T. 625:20-32; 633:4-15), while delinquencies existed, the United States agreed to a moratorium on the payments due under the note secured by the ship mortgages on the Coast Progress. Payments of $436,080 were postponed. See Reply Br. App. ¶¶ 64, 66, 69, 73, 80, 84. [note continued]

5. The lien for wages would be available as security even if this action were brought solely to collect "Employer Contributions" as being due under the individual employment contracts.

Respondents could not defeat the maritime lien simply by establishing that the action is for "Employer Contributions" rather than for the cash value of the fractional rights to deferred compensation. For purposes of argument in this section, we shall assume that the seaman's contract did not specify an obligation to provide the fractional rights but specified only - as to the deferred compensation part of the consideration for maritime services - that the employer had the obligation to pay these contributions. The other facts and their legal consequences-including the equivalence between the amount of the contributions and the value of the fractional rights-are as discussed above.

In case a seaman's vessel fails to make the contributions he has earned and the trust fails to secure collection of these funds through its own efforts, the seaman would be entitled to proceed in court to enforce the obligation to pay contributions to the trusts. Once he has worked, he has this right as part of the multi-obligation wage consideration he earned under his individual contract of employment. Whether he gets the benefits that the trusts provide because there is an obligation to pay contributions or because they are paid, the seaman has a legal right to compel the payment of these contributions to satisfy the obligation to him created by his working on the vessel. This right is protected by the lien for wages. Upon the failure of the vessel's operator to pay these sums, as here, the seaman can libel the vessel to require their payment to the trusts.

As the seamen can libel the vessel, to the trusts can stand in the shoes of the seamen to collect them in this way. The trust pays

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The existence of deferred compensation trusts was known to all concerned. See Reply Br. App. ¶¶ 17-24; 25-29; etc.

Neither respondent can say that an amount of unpaid wages covered by the lien was a "secret" to it. Neither the trusts nor the unions nor the non-privy employers had their knowledge or their access to details. It was respondents, not the trusts, that were permitting the operators to run up excessive liabilities secured by the vessels libeled.

money out on the basis of the rights that the seamen have that the required payments be made into the trusts.[19] The seaman has the lien to secure the payment of these amounts. Having advanced to the seaman the value of the contributions in reliance on the lien-by giving him credit for the fractional rights that he earned, which have value equal to these contributions (see 10, supra)-the trust gained the lien security for these wages. This lien is extinguished only when the amounts owed are paid by the vessel's representative.

CONCLUSION

Applicable admiralty law, which has been presented in some detail to this Court, establishes that a vessel stands as security for all types of compensation that are payable to members of its crew for the performance of maritime services upon it. The priority of this lien has been recognized in admiralty decisions over scores of years. Maritime services have been performed; the vessel and its operator have failed to provide the money that is necessary to meet these wage obligations. The lien against the vessel stands as security to require that the vessel or its operator pay these sums. The trusts have advanced the seaman his agreed wages in reliance on the lien. We submit it should be enforced in this proceeding.

Respectfully submitted,

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19. The seamen have designated the trusts as their agent to enforce their rights to have these contributions paid to provide funds for the deferred compensation rights they acquire by working on the vessel. Through their duly designated exclusive collective bargaining agent, the seamen have directed and authorized the trusts to collect these "wages", the rights to have contributions paid.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

RICHARD ERNST